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December 8, 2017

VIA ELECTRONIC FILING

Ms. Jocelyn Boyd, Chief Clerk/Administrator
Public Service Commission of South Carolina
Synergy Business Park, Saluda Building
101 Executive Center Drive
Columbia, SC 29210

Re: Shorthorn Solar, LLC, et al. v. Duke Energy Carolinas, LLC and Duke Energy Progress, LLC
Docket No. 2017-281-E

Dear Ms. Boyd:

Enclosed for filing is a Response in Opposition to Motion to Maintain Status Quo on behalf of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC in the referenced docket.

Please contact me should you have any questions concerning this filing.

Yours truly,

Frank R. Ellerbe, III

FRE:tch

Enclosure

cc w/enc: Richard Whitt, Esquire (via email)
Andrew M. Bateman, Counsel (via email)
Benjamin L. Snowden, Esquire (via email)
Heather Shirley Smith, Deputy General Counsel (via email)
Rebecca J. Dulin, Senior Counsel (via email)

BEFORE THE

PUBLIC SERVICE COMMISISON OF SOUTH CAROLINA

DOCKET NO. 2017-281-E

In Re: Shorthorn Solar, LLC; Rollins Solar, LLC; Juniper Solar, LLC; Meslam Solar, LLC; Culpepper Solar, LLC; Ashley Solar, LLC: Jefferson Solar, LLC; Madison Solar, LLC; Fairfield Solar, LLC; Bell Solar, LLC: Webster Solar, LLC; B&K Solar, LLC; GEB Solar, LLC; Ross Solar, LLC; Summerton Solar Farm, LLC; Clarendon Solar Farm, LLC; Azalea Solar LLC; Cardinal Solar LLC; Sunflower Solar LLC; Cosmos Solar LLC; Zinnia Solar LLC; Chester PV1, LLC; Ninety-Six PV1, LLC; Newberry PV1, LLC; Bradley PV1, LLC; Jonesville PV1, LLC; Ft. Lawn PV1, LLC; Mt. Croghan PV1, LLC; Whitetail Solar, LLC; Rhubarb One LLC; Cotton Solar, LLC; and Shorthorn Holdings, LLC, Complainants/Petitioners, v. Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Defendants/Respondents.	)	Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response in Opposition to Motion to Maintain Status Quo

Pursuant to 10 S.C. Code Ann. Regs. 103-829(A) and other applicable rules of practice and procedure of the Public Service Commission of South Carolina (the "Commission"), Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, "Duke Energy" or the "Companies") hereby respond in opposition to the Motion to Maintain Status

Quo, filed on November 28, 2017 by certain of the above-captioned Complainants ("Movants").[1] Duke Energy respectfully requests that the Motion to Maintain Status Quo (the "Motion") be denied for the reasons explained below.

BACKGROUND

On August 31, 2017, twenty-eight solar qualifying facility ("QF")[2] project limited liability companies ("Solar QF Project LLCs") owned by Southern Current LLC, Adger Solar, LLC, National Renewable Energy Corporation, and Ecoplexus, Inc. (the "Solar Developers") filed a complaint against DEC and DEP, alleging that the Companies' offer to enter into five-year term power purchase agreements ("PPAs") with the Solar Developers' Solar QF Project LLCs violates the Public Utility Regulatory Policies Act of 1978 ("PURPA"). On October 16, 2017, Duke Energy answered the Solar Developers' Complaint, responding that DEC and DEP have fully satisfied their obligations under PURPA, Federal Energy Regulatory Commission ("FERC") regulations and precedent, and South Carolina law and precedent, and have acted in good faith, by offering to purchase the output of Complainants' proposed solar generation projects—in aggregate, more than 1,150 megawatts ("MW") of new solar capacity—at rates calculated based on the Companies' fixed forecasted avoided capacity and energy costs over five year terms.

[1] The Motion states that the "Movants" are projects of Southern Current LLC, Adger Solar, LLC, and National Renewable Energy Corporation, which, upon information provided in the Complaint, the Companies believe to be Shorthorn Solar, LLC; Rollins Solar, LLC; Juniper Solar, LLC; Meslam Solar, LLC; Culpepper Solar, LLC; Ashley Solar, LLC: Jefferson Solar, LLC; Madison Solar, LLC; Fairfield Solar, LLC; Bell Solar, LLC: Webster Solar, LLC; B&K Solar, LLC; GEB Solar, LLC; Ross Solar, LLC; Summerton Solar Farm, LLC; Clarendon Solar Farm, LLC; Azalea Solar LLC; Cardinal Solar LLC; Sunflower Solar LLC; Cosmos Solar LLC; and Zinnia Solar LLC. Ecoplexus, Inc. is not identified as a Movant in the Motion on behalf of its QF projects.

[2] The Solar QF Project LLCs assert in the Docket No. 2017-281-E Complaint that they are certified as QFs under PURPA (Compl. ¶ 2), but the Companies are without sufficient information to verify this claim for all of the complainants in that docket.

Also on October 16, 2017, four solar QF[3] project limited liability companies owned by Birdseye Renewable Energy (the "Birdseye Solar QF Project LLCs") and represented by the same counsel as the Solar Developers filed an essentially identical complaint against DEC and DEP (the "Docket No. 2017-321-E Complaint").[4] On that same day, the Birdseye Solar QF Project LLCs also filed consolidated motions (1) moving the Commission to consolidate Docket No. 2017-321-E with Docket No. 2017-281-E;[5] and (2) "mov[ing] this Commission to maintain the status quo between the Complainants and the Duke [s*ic*], as of October 16, 2017." On October 30, 2017, the Companies filed a Response in Opposition to the Birdseye Solar QF Project LLCs' Motion to Maintain Status Quo.

ARGUMENTS IN OPPOSITION

I. The Motion lacks sufficient specificity, and factual and legal support, and, therefore, should be denied.

As an initial matter, Movants' relief requested lacks sufficient specificity, as well as sufficient factual and legal support, and, therefore, should be denied. The Commission's procedural rules require all pleadings, including motions, to provide the Commission a "concise and cogent statement of facts" and a "statement identifying the specific relief sought by the person filing the [motion]." 10 S.C. Code Ann. Regs. 103-819(C)-(D). The South Carolina Rules of Civil Procedure ("S.C.R.C.P.") similarly require a motion to "state with particularity the grounds therefor, and . . . the relief or order sought." S.C.R.C.P. § 7(b)(1).

The relief sought by Movants is improperly vague and is not pled with sufficient particularity or specificity to allow the Companies to understand or effectively respond to the

[3] The Docket No. 2017-321-E Complaint asserts that Complainants are certified as QFs under PURPA (Compl. ¶ 2), but the Companies have not verified this claim.

[4] On November 17, 2017, the Companies answered the Docket No. 2017-321-E Complaint.

[5] In Order No. 2017-703, issued November 8, 2017, the Commission approved the consolidation of Docket No. 2017-321-E into the instant docket.

Motion. Movants move to "preserve those stated items," which are described as "Contract deadlines," "Contract milestones," "queue positions," and "interconnection Agreement payments." Motion at 2. Movants also move to "preserve . . . Movants' rights, in general." *Id.* Further, the Movants describe the "specific Contract/rights/deadlines/payments" as those at issue in "all PPAs, Interconnection Agreements and related documents." *Id.* The Motion does not identify any specific contracts existing between the Companies and Movants or any corresponding rights, deadlines, or payments associated therewith that are the subject of this Motion. Nor do Movants provide any description of what additional "rights, in general" they wish to preserve. Further, it is unclear to what "related documents" Movants refer that are also the subject of this Motion. Movants' failure to describe the requested relief specifically, as required by the pleading requirements of the Commission and the S.C.R.C.P. deprives Duke Energy of its due process rights to fair notice of the specific relief sought. Notwithstanding these objections, the Companies have attempted to address in this Response what they believe to be the requested relief of Movants.

The Motion also fails to provide sufficient legal and factual support to justify the requested relief. Movants offer only unsupported allegations and conclusory assertions, alleging Duke Energy's decision to offer five-year term PPAs is "arbitrary," in "bad-faith" and "designed to help Duke [Energy] reduce or purge its backlogged queue." Motion at 2-3. Completely unrelated to the instant proceeding, and, again, without any underlying facts or evidence, Complainants also allege that "Duke's queue is not in compliance with guidelines." *Id.* at 2. The Motion provides no facts or any documentation to support these allegations. Moreover, to the extent Complainants take issue with Duke Energy's interconnection processes, Section 6.2 of the South Carolina Generator Interconnection Procedures ("SC GIP") requires any such dispute

to be brought initially through its informal dispute resolution procedures, which Complainants have failed to do here.

As Movants have admitted, neither PURPA nor FERC's implementing regulations specify minimum or maximum terms for negotiated PURPA contracts.[6] Further, this Commission has not previously specified a minimum or maximum term for PPAs with QFs that are not eligible for the standard-offer tariff. Instead, the Commission has consistently decided to leave such terms to be negotiated between the parties—as is the case here.[7] Consistent with the framework approved by the Commission, and contrary to Movants' allegations, the Companies have met their obligations under PURPA by offering in good faith to purchase power from those Movants that have requested to negotiate PPA contracts at the Companies' current forecast of their respective avoided capacity and energy costs through PPAs for terms of five years.

Notably, the Commission has previously approved a term of one year for a standard-offer contract.[8] Further, the Commission has specifically denied claims that a five year PPA with an avoided cost rate that resets every two years renders QF projects unfinanceable or violates

[6] *See* Complaint at 8.

[7] *See* Order No. 81-214 at p. 9 (recognizing "the substantial flexibility of negotiation which is reserved to each contracting party under part 292.301(b)"); *In re: Small Power Production and Cogeneration Facilities – Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 85-347 at pp. 20-21 (Aug. 2, 1985) ("Order No. 85-347") ("The Commission urges voluntary negotiations of long-term contracts"); *In re: Small Power Production and Cogeneration Facilities – Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 85-770 at pp. 4-5 (Sept. 5, 1985) ("Order No. 85-770") (denying petition for reconsideration and rehearing of Order No. 85-347 and explaining that "[t]he questions of unfairness and financial difficulties are a matter of point of view, needs of the individual QF, needs of the utility, and the needs of the ratepayers. Good faith negotiations should resolve these issues."); and *In re: Small Power Production and Cogeneration Facilities – Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 89-56 at p. 9 (Feb. 8, 1989) (continuing to decline to mandate long-term rates as part of the standard PURPA contract and encouraging negotiation).

[8] *In re: Proceeding for Approval of PURPA Avoided Cost Rates for Electric Companies*, Order No. 96-570 (Aug. 28, 1996) (adopting stipulation between Duke Power Company and the Consumer Advocate providing for reduction in initial standard offer contract term from five years to one year).

PURPA.[9] In fact, the Commission order that Movants claim Duke Energy has violated is the same order that approved DEP's (then Carolina Power & Light) five-year standard-offer contract with rates that update every two years.[10] Motion at 3. Given this precedent, it is unreasonable to conclude that Duke Energy's offering of a five-year PPA is in bad faith.

Movants' disregard for the pleading requirements of the Commission and the S.C.R.C.P. and Movants' failure to set forth sufficient facts or law supporting their request warrants denial of this Motion.

II. The Motion is premature as to those Movants that have not entered into PPAs or Interconnection Agreements with the Companies, and therefore, should be denied as to those Movants.

While Movants have not provided a legally sufficient description of their requested relief, as described above, to the extent Movants request particular treatment as to the contract provisions in any PPAs to which the Companies and Movants are parties (such as suspension of deadlines or payments), the Motion is premature, as no such contracts exist. Similarly, to the extent the Motion requests particular treatment as to the contract provisions in any Interconnection Agreements to which the Companies and Movants are parties, the Motion is premature as to 19 of the 21 Movants. Clarendon Solar Farm, LLC and Cardinal Solar, LLC are the only two Movants that have entered into an Interconnection Agreement with either of the Companies. It would be premature and inappropriate for the Commission to grant relief to Movants related to contracts that do not exist today. As a result, to the extent the Motion requests relief related to the contract provisions of PPAs or Interconnection Agreements, the

[9] Order No. 85-347 (Aug. 2, 1985) (approving five-year standard offer contract for Carolina Power and Light Company) (petition for reconsideration and rehearing denied in Order No. 85-770).

[10] *Id*. at p. 35.

Motion should be denied as to those Movants that are not parties to such agreements with the Companies.

III. The Commission should deny the requested relief because it is unnecessary given Duke Energy's obligations under PURPA and results in the discriminatory treatment of others similarly-situated interconnection customers.

Notwithstanding the above objections, to the extent the Motion concerns the "contract rights" of Movants, the Motion fails to recognize that the DEC and DEP remain obligated under PURPA to offer contracts to purchase the output of Movants' QF solar generating facilities, irrespective of either the existence of this proceeding or the outcome of the Motion.[11] Indeed, the rights and obligations set forth in PURPA and FERC's implementing regulations inherently protect the Movants' "contract rights" with respect to PPAs under PURPA. The Complaint in no way jeopardizes the Movants' right to contract for the sale of energy and capacity with Duke Energy under PURPA. The Companies have offered Movants—like all other comparable QFs above two MW—a negotiated avoided cost PPA for a five-year term. This negotiated PPA offering to purchase energy and capacity from the Movants' Solar QF Project LLCs over a five-year term, which has already been delivered to Movants, provides the "status quo" for all QFs ineligible for Schedule PP. Accordingly, to the extent the Motion concerns the "contract rights" of Movants, the Motion should be denied as moot.

Moreover, Movants' baseless allegations and vague requests as to "queue position" and Interconnection Agreements are irrelevant to the subject of underlying proceeding, which is specific to the five-year term PPAs the Companies offer QFs pursuant to PURPA. The Complaint does not present a single allegation as to the Companies' generator interconnection processes. Further, to the extent Movants take issue with Duke Energy's interconnection

[11] *See* 18 C.F.R. 292.303(a).

processes, Section 6.2 of the SC GIP requires any such dispute to be brought initially through its informal dispute resolution procedures, which Movants have failed to do here. While counsel for the Companies agreed that a Notice of Dispute under Section 6.2 of the SC GIP was not required for a Complaint specific to the term of a PPA under PURPA, Movants are now improperly raising new allegations in this Motion with regard to the Companies' interconnection processes. Such allegations and requested relief related thereto must be brought in accordance with Section 6.2 of the SC GIP.

In addition to the fact that generator interconnection is simply not at issue in this proceeding and, therefore, cannot be the subject of any relief granted to Movants, and notwithstanding the Companies' objections as to the prematurity of this Motion as to those Movants who are not parties to Interconnection Agreements, it would be improper for the Commission to extend special treatment to Movants in a manner that would discriminate against and likely harm others in the Companies' interconnection queues. In accordance with the procedures set forth in the SC GIP, the Companies are currently processing over 3,400 MW of utility-scale solar interconnection requests in the Companies' interconnection queues. Many of Movants' interconnection requests are currently "interdependent" with other later-queued interconnection requests that would be adversely impacted, financially harmed and delayed if payment obligations under Movants' Interconnection Agreements were not enforced. Section 5.2.4 of the SC GIP requires the utility to withdraw an Interconnection Request if Payment and Financial Security is not received by close of business forty-five business days after the date the Interconnection Agreement is signed by the Interconnection Customer.[12] Under the Memorandum of Understanding between the Companies, the South Carolina Office of Regulatory Staff, and the South Carolina Solar Business Alliance, approved by the Commission

[12] The capitalized terms in this sentence reflect defined terms in the SC GIP.

in Docket No. 2015-362-E ("Interdependency MOU"), "[t]he Utility shall not study a project if it is interdependent with more than one project, each of which has a lower Queue Number." Interdependency MOU at 5(a). Further, the removal of interdependency occurs when "a lower Queue Number project sign[s] an Interconnection Agreement and mak[es] payments required under Section 5.2.4." *Id*. (emphasis added). This provision in the Interdependency MOU furthers transparency and non-discriminatory treatment, recognizing that it would be unfair to require a later-queued interdependent project to make decisions about whether to advance through the interconnection study process, where system impacts and associated costs to upgrade the utility's system are determined based on earlier-queued projects, until there is some strong indication (in the form of payment under Section 5.2.4) that the earlier-queued project is in fact going to be constructed. Further, the fact that payment of System Upgrades is non-refundable under the SC GIP is also significant. In determining the impact of later-queued interdependent projects, the Companies require certainty in determining whether System Upgrades will be built before determining the costs to interconnect later-queued interdependent projects. Therefore, should the Commission determine that Movants are not required to proceed through the study process and to make payments under the Interconnection Agreement, later-queued projects interdependent on Movants' projects would not be able to move forward in the queue during the pendency of this proceeding, resulting in discriminatory treatment of others in the Companies' interconnection queues.

The "status quo" is that Duke Energy must continue making reasonable efforts to move forward with the generator interconnection study process under the SC GIP and proceed with studying all interconnection requests, including Movants, on a non-discriminatory basis in queue

priority order. To do otherwise, would be discriminatory and unfair to other interconnection customers, particularly those with interdependent interconnection requests.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Duke Energy requests that the Motion be denied.

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Columbia, South Carolina
December 8, 2017

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-281-E

Shorthorn Solar, LLC; Rollins Solar, LLC; Juniper Solar, LLC; Meslam Solar, LLC; Culpepper Solar, LLC; Ashley Solar, LLC; Jefferson Solar, LLC; Madison Solar, LLC; Fairfield Solar, LLC; Bell Solar, LLC; Webster Solar, LLC; B&K Solar, LLC; GEB Solar, LLC; Ross Solar, LLC; Summerton Solar Farm, LLC: Clarendon Solar Farm, LLC; Azalea Solar LLC; Cardinal Solar LLC; Sunflower Solar, LLC; Cosmos Solar, LLC; Zinnia Solar, LLC; Chester PV1, LLC; Ninety-Six PV1, LLC; Newberry PV1, LLC; Bradley PV1, LLC; Jonesville PV1, LLC; Ft. Lawn PV1, LLC; Mt. Croghan PV1, LLC, Whitetail Solar, LLC; Rhubarb One LLC; Cotton Solar, LLC; and Shorthorn Holdings, LLC Complainants/Petitioners, v. Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Defendants/Respondents.	)	**CERTIFICATE OF SERVICE**

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below **Duke Energy Carolinas, LLC's and Duke Energy Progress, LLC's Response in Opposition to Motion to Maintain Status Quo** in the foregoing matter via electronic mail addressed as indicated below:

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Dated at Columbia, South Carolina this 8th day of December, 2017.